Alien Smuggling: Grounds of Inadmissibility and Deportability

Sections 212(a)(6)(E) and 237(a)(1)(E) of the Act

I. Alien Smuggling Provisions

A. Inadmissibility: "Any alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is inadmissible." Section 212(a)(6)(E)(i) of the Act.

B. Deportability: "Any alien who (prior to the date of entry, at the time of any entry, or within five years of the date of any entry) knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is deportable." Section 237(a)(1)(E)(i) of the Act.

C. Each ground has a special rule/exception in the case of family reunification, as well as a waiver. *See* sections 212(a)(6)(E)(ii) & (iii) of the Act; sections 237(a)(1)(E)(ii) & (iii) of the Act.

II. Burden of Proof and Standard of Proof

A. Deportability: DHS must establish by clear and convincing evidence that the alien took actions that amount to knowingly encouraging, inducing, assisting, abetting, or aiding any other alien's unlawful entry into the United States. Section 240(c)(3)(A) of the Act; *see Perez-Arceo v. Lynch*, 821 F.3d 1178, 1183 (9th Cir. 2016); *Woodby v. INS*, 385 U.S. 276, 286 (1966).

B. Inadmissibility: Alien must establish he or she did not knowingly encourage, induce, assist, abet, or aid any other alien to unlawfully enter or try to enter the United States.
   1. Arriving aliens: An applicant for admission bears the burden of proving that he or she is clearly and beyond doubt entitled to be admitted and is not inadmissible under section 212 of the Act; or by clear and convincing evidence that he or she is lawfully present in the U.S. pursuant to a prior admission. Section 240(c)(2)(A) of the Act; *see Altamirano v. Gonzales*, 427 F.3d 586, 590 (9th Cir. 2005).
   2. LPRs: Generally, an alien who is an LPR returning from abroad is not regarded as an applicant for admission. Section 101(a)(13)(C) of the Act. But a returning LPR who has engaged in illegal activity after having departed U.S. is deemed to be an applicant for admission and thus charged under section 212 of the Act, instead of section 237 of the Act. *See* section 101(a)(13)(C)(i)-(vi) of the Act; *see*

also Guerrero v. Att'y Gen. of U.S., 515 F. App'x 146 (3d Cir. 2013) (persuasive authority).

III. Establishing an Alien Smuggling Allegation: Elements

(1) **Knowingly** has
(2) **Encouraged, induced, assisted, abetted or aided** any other alien
(3) **To enter or to try to enter** the United States in violation of law

Is inadmissible/deportable. *See Dimova v. Holder*, 783 F.3d 30 (1st Cir. 2015).

IV. Entry: What constitutes an "entry?"[1]

A. An "entry" requires:
(1) A crossing into the territorial limits of the United States, i.e., physical presence;
(2) (a) an inspection and admission by an immigration officer, or
(b) an actual and intentional evasion of inspection at the nearest inspection point; and
(3) freedom from official restraint.

Matter of Martinez-Serrano, 25 I&N Dec. 151, 153 (BIA 2009) (citing *Matter of Z-*, 20 I&N Dec. 707, 708 (BIA 1993)); *see Dimova v. Holder*, 783 F.3d at 38 (deferring to the Board's interpretation of the term "entry" but declining to announce any bright-line rule or definitive definition of "entry").[2]

B. An "entry" may include: other related acts that occurred either before, during, or after a border crossing, so long as those acts are in furtherance of, and may be considered to be part of, the act of securing and accomplishing the entry.

Matter of Martinez-Serrano, 25 I&N Dec. at 154; *see Dimova v. Holder*, 783 F.3d at 38 (agreeing with the Ninth Circuit in *United States v. Gonzalez-Torres*, 309 F.3d 594, 598 (9th Cir. 2002), that entry into the United States "requires more than mere physical presence within the country" and that "an alien must cross the United States border free from official restraint" to "enter" the country); *see also Urzua Covarrubias v. Gonzales*, 487 F.3d 742, 748 (9th Cir. 2007) (stating that section 212(a)(6)(E)(i) of the Act "does not describe acts that constitute static or instantaneous occurrences," but rather describes "acts that occur over a period of time and distance, and … not … at one particular moment or location").

C. "Try to enter": Mere preparation to bring other aliens into the United States is not enough to constitute attempted entry. *See Juarez-Mendez v. Holder*, 377 F. App'x 645 (9th Cir. 2010) (concluding that the petitioner did not aid and abet attempted alien smuggling because no "attempt" had been committed where the petitioner had engaged in preparations to bring children across the border, their parents had not yet decided

how they would effect a crossing, and the aliens' plan to illegally enter the United States was thwarted before they made an attempt to enter).

V. Mens Rea: "Knowingly"

A. Plain language of the statute: An alien who knows that another alien has crossed the border illegally and provides some sort of affirmative act of assistance that makes it easier for the illegal alien to avoid apprehension at the border. *See Dimova v. Holder*, 783 F.3d at 41-42 (noting that, notwithstanding alien's motivation in assisting out of humanitarian concern, the statute requires nothing more than a knowing act of assistance to attempted illegal entry into U.S. to render alien removable); *see also Guerrero v. Att'y Gen. of U.S.*, 515 F. App'x at 150 (persuasive authority) (noting that actual knowledge is required).

B. An "obvious pattern of [assistance]" can help establish mens rea: *Ramos v. Holder*, 660 F.3d 200, 204, 206 (4th Cir. 2011) (determining that "a nearly-identical arrival process provides considerable reason to infer that at least by the time [respondents] received their second, third, and fourth calls from Mexico asking for money, they knew the money would be used to pay for illegal passage to the United States"); *see also Sanchez-Marquez v. U.S. INS*, 725 F.3d 61, 63 (7th Cir. 1984) (per curiam) (determining there was sufficient circumstantial evidence to establish that petitioner acted knowingly in assisting seven aliens in crossing the border illegally).

C. A mistaken belief that an alien was entitled to enter the U.S. legally would be a defense to ineligibility for an alleged smuggler. *See Tapucu v. Gonzales*, 399 F.3d 736, 739 (6th Cir. 2005) (citing 9 U.S. Department of State Foreign Affairs Manual § 40.65 n.4 (1995) in interpreting "knowingly" in section 212(a)(6)(E) of the Act); *cf. Chambers v. Office of Chief Counsel*, 494 F.3d 274, 278-79 (2d. Cir. 2007) (noting that nature of respondent's false statements at border about smuggled alien's residency in the U.S. supported inference drawn by IJ and Board that respondent knew that alien could not legally enter the U.S., despite respondent's contention that her behavior was consistent with acts of someone who thought she was participating in a legal act).

VI. Act of assistance[3]

A. When has an alien "assisted, abetted, or aided" an entry?

1. "Bright-line test" [4]: Affirmative act of assistance required – 1C, 6C, 9C

a) Sixth Circuit: Act must be "compensable" and "illicit" – *Tapucu v. Gonzales*, 399 F.3d at 739 (holding that alien did not violate anti-smuggling of aliens statute and noting that even though "for gain" requirement was eliminated, the "provision still requires an affirmative and illicit act of assistance" and that "the statute still requires the would-be smuggler to commit a compensable act – to do something for which remuneration reasonably *could* be made even if it need not be proved").
    - (Scenario: LPR driver of car with passenger [who had been residing unlawfully in the U.S. for a number of years] knew passenger had been living illegally in the U.S. but believed alien was lawfully permitted to enter the U.S. because of pending green card application)
b) Ninth Circuit: Mere presence at scene of illegal entry and knowledge of the entry is not enough – *Altamirano v. Gonzales*, 427 F.3d 586 (9th Cir. 2005) (agreeing with the Sixth Circuit's reasoning of affirmative act but not explicitly adopting its holding that act must be "compensable")
    - (Scenario: Woman traveling into the U.S. in car driven by others, with knowledge that alien was being smuggled in the trunk, did not encourage, induce, assist, abet, or aid the unlawful entry under section 212(a)(6)(E) of the Act)
    - The Ninth Circuit made its conclusion by looking to the "well-established meaning of aiding and abetting" in criminal law, noting, inter alia, that "[a] defendant cannot be convicted of aiding and abetting absent an affirmative act of assistance in the commission of the crime." *Id.* at 594-95 (collecting cases).
c) The First Circuit agreed with the Ninth Circuit that "the plain meaning of this statutory provision requires an affirmative act of help, assistance, or encouragement" for an alien to have engaged in alien smuggling – *Dimova v. Holder*, 783 F.3d at 40 (but staying silent on whether act must be "compensable").
d) **BUT**: Alien who acquiesced in use of her children's birth certificates in a smuggling attempt and was present in the car during the attempt, where nothing in the record established that alien physically handed over the birth certificates **did not make an affirmative act**. *Aguilar Gonzalez v. Mukasey*, 534 F.3d 1204 (9th Cir. 2008). Note: Dissent in *Aguilar Gonzalez* stated that alien's reaction to request for birth certificates was "explicit permission" rather than "reluctant acquiescence" and concluded positive agreement constituted affirmative act. *Id.* at 1209-10.
e) Also, mere transportation of an alien within the United States **does not constitute an affirmative act**. The Third Circuit has determined that an

alien whose conduct was "strictly limited to picking up the aliens once they had already crossed the border and transporting them from one area in the United States to another" was not inadmissible under section 212(a)(6)(E)(i) of the Act. *Parra-Rojas v. Att'y Gen. of U.S.*, 747 F.3d 164, 171 & n.9 (3d Cir. 2014) (holding that "record is clear that Petitioner had no involvement with the aliens prior to their entry into the United States, did not provide any assistance, financial or otherwise, in their entry, and did not commit any other "affirmative act" . . . as required by [section 212(a)(6)(E)(i)]).

2. **No "bright-line test" as to whether actions are sufficient to prove alien encouraged, induced, assisted, abetted, or aided in smuggling in violation of section 212(a)(6)(E) of the Act – 2C, 4C, 8C[5]**
   a) Second Circuit: *Chambers v. Office of Chief Counsel*, 494 F.3d at 279 (contrasting behavior of alien with that of aliens in *Tapucu* and *Altamirano* in that alien "personally arranged to provide transportation for [the smuggled alien] into U.S. and purposefully deceived customs officials at time of his attempted entry").
   b) Fourth Circuit: "Affirmative act of assistance may suffice": *Ramos v. Holder*, 660 F.3d at 205 & n.3 (noting also that respondents' reliance on *Tapucu* is misplaced and declining to add "limitations absent from the words of the statute," including a requirement that acts in the alien smuggling statute involve the "'commission of a compensable act' or an 'illicit' act").
   c) *Sandoval-Loffredo v. Gonzales*, 414 F.3d 892 (8th Cir. 2005) (holding that individual who drove his brother to U.S.-Canadian border and falsely claimed that his brother was a USC was inadmissible under section 212(a)(6)(E)(i) of the Act because IJ concluded that individual did in fact attempt to assist his brother by making false claim at border).
   d) U.S. Department of State believes that this [statutory provision] includes bringing in a minor child (as a minor child is not excused from this violation for lack of legal capacity). Letter, Odom, Chief Advisory Opinions, Visa Services (Oct. 20, 1993), *reprinted in 71 No. 10 Interpreter Releases* 352, 375-78 (Mar. 14, 1994).

B. When has an alien "encouraged" or "induced" another alien to enter illegally?[6]

1. *Sanchez-Marquez v. U.S. INS*, 725 F.2d at 63 (holding that alien who promised other aliens whom he met in Mexico that he would drive them from Texas border to Chicago if they met him on the American side of the border could "certainly be construed as having 'encouraged' or 'induced' [them] to cross the border illegally" and was deportable under section 241(a)(13) of the Act).

2. The Ninth Circuit has noted the U.S. Department of State's Foreign Affairs Manual's interpretation of such ineligible actions under section 212(a)(6)(E)(i) of the Act. *See Altamirano v. Gonzales*, 427 F.3d at 593 n. 6 ("They could be as little as offering an alien a job under circumstances where it is clear that the alien will not enter the United States legally in order to accept the employment (encourage and induce), or they might actually involve physically bringing an alien into the United States illegally (aid and assist).").
3. The First Circuit has apparently differentiated between "encourag[ing]" or "induc[ing]" a physical crossing and mere assistance, or aiding or abetting, an attempted entry. *See Dimova v. Holder*, 783 F.3d at 40 (stating that alien need not have "encouraged" or "induced" [aliens] to cross the border to be removable but "*only* have 'assisted, abetted, or aided' [aliens'] attempted illegal entry") (emphasis added).

C. Ambit of the Statute: How long after entry can the assistance be related back to the entry itself?[7]

1. An alien may be removable <u>in certain situations</u> for transporting or harboring another alien within the U.S. after the fact of smuggling into the U.S.
   a) **"Bright-line" rule – 9C[8]:** <u>Liability exists only until initial transporter stops transporting alien</u>: *Urzua Covarrubias v. Gonzales*, 487 F.3d at 747 (finding alien may be liable for assisting smuggling effort "until initial transporter who brings alien to U.S. ceases to transport alien"); *see also Matter of I-M-*, 7 I&N Dec. 389, 390-91 (BIA 1957) (concluding that respondent who transported several aliens did not aid or abet their illegal entries where the respondent did not provide transportation until days or weeks after each individual physically entered U.S.); *cf. Soriano v. Gonzales*, 484 F.3d 318, 321 (5th Cir. 2007) (holding act of transporting aliens near border in truck within a few hours after initial entry may be sufficient evidence that prearranged plan was in effect); *Matter of Martinez-Serrano*, 25 I&N Dec. at 153 (finding that alien who harbored illegal aliens after their entry is removable so long as her conduct was tied to smuggled aliens' manner of entry).

D. What if alien did not actually participate in the physical crossing?

1. BIA: *Matter of Martinez-Serrano*, 25 I&N Dec. at 152-155 (noting that direct participation on the physical border crossing is not required); *Matter of Vargas-Banuelos*, 13 I&N Dec. 810 (BIA 1971).
2. Circuit courts of appeals:
   a) *Dimova v. Holder*, 783 F.3d at 30 (agreeing with Fifth Circuit and Seventh Circuit that person assisting in smuggling need not be physically present at the

time or place of illegal crossing to be charged with assistance); *Ramos v. Holder*, 660 F.3d at 205 (noting that physical presence at the border is not a necessary condition to satisfy section 212(a)(6)(E) of the Act); c*f. Parra-Rojas*, 747 F.3d at 170 (stating that where petitioner did not know aliens before entering the U.S. and where illegal crossings took place "several days" before petitioner picked them up, did not violate alien smuggling provision)

b) *Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674, 678-83 (9th Cir. 2005) (noting that smuggling deportability ground under section 237(a)(1)(E)(i) of the Act not limited solely to persons who participate in physical border crossing and that the provision that makes smuggling a deportable offense does not cover mere transportation or harboring of aliens within the United States); "An individual may knowingly encourage, induce, assist, abet, or aid with illegal entry, even if he did not personally hire the smuggler and even if he is not present at the point of illegal entry." *Id.* at 679; *Soriano v. Gonzales*, 484 F.3d at 318 (noting that alien seeking admission to U.S. who participates in scheme to aid other aliens in illegal entry is inadmissible regardless of whether assisting individual was present at border crossing)

E. A criminal conviction is not determinative and an Immigration Judge can consider the underlying conduct of an alien's conviction for purposes of determining removability for alien smuggling

1. *Matter of Martinez-Serrano*, 25 I&N Dec. at 155 (holding that an alien's conviction under 18 U.S.C. § 2(a) and 8 U.S.C. § 1325(a)(2) for aiding and abetting another alien to enter the U.S. in violation of the law establishes that the convicted alien is removable under section 237(a)(1)(E)(i) of the Act, and because removability under section 237(a)(1)(E)(i) does not require a conviction, can look to facts underlying the conviction to demonstrate that alien knowingly assisted other aliens to enter the U.S. in violation of the law)
2. *Santos-Sanchez v. Holder*, 744 F.3d 391 (5th Cir. 2014) (noting *Martinez-Serrano* and holding that regardless of whether every violation of 8 U.S.C. § 1325(a) automatically establishes removability under section 237(a)(1)(E)(i), the respondent is removable as the particular conduct described in his conviction documents establish his removability under section 237(a)(1)(E)(i) of the Act)
3. *Parra-Rojas*, 747 F.3d at 168-69 (noting alien need not be charged with or convicted of any criminal offense in order to be deemed inadmissible under smuggling bar); *see also Guerrero v. Att'y Gen. of U.S.*, 515 F. App'x 146 (3d Cir. 2013); *Alonso Fernandez v. Holder*, 422 F. App'x 341 (5th Cir. 2011).

VII. When does the statutory waiver for alien smuggling apply?

A. Inadmissibility: A waiver under section 212(a)(6)(E)(iii) of the Act cross-references section 212(d)(11) of the Act (the actual provision authorizing waiver); this limited waiver (AG discretion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest) is available for LPRs and applicants for an immigrant visa, who assisted spouse, parent, son or daughter (and no other individual) to enter the U.S. in violation of law.
    1. *Matter of Compean*, 21 I&N Dec. 51 (BIA 1995) (sustaining INS appeal as to IJ granting section 212(d)(11) waiver of excludability to applicant).
    2. Waiver is available for LPRs returning from abroad and to persons who are seeking admission as IR or under sections 203(a)(1)-(3) of the Act.
    3. But the Ninth Circuit has held that waiver may not be applied to overcome GMC bar under INA § 101(f)(3). *See Sanchez v. Holder*, 560 F.3d 1028 (9th Cir. 2009); *see also Velazquez-Macedo v. U.S. Atty. Gen.*, 535 F. App'x 806, 808-09 (11th Cir. 2013) (upholding the Board's decision, in an unpublished opinion, that alien was not eligible for family-unity waiver as he was not an LPR and was not seeking admission or adjustment of status as an IR).

B. Deportability: section 237(a)(1)(E)(iii) of the Act – **"at the time of the smuggling"**
    1. *Matter of Farias*, 21 I&N Dec. 269, 271-75 (BIA 1996, 1997; A.G. 1997) (noting that waiver of alien smuggling deportability ground under section 241 of the Act is available to LPRs who aided and abetted the unlawful entry of only their spouse, parent, son or daughter and if familial relationship arose after smuggling but existed at time of application for relief)*; cf. Perez-Oropeza v. INS*, 56 F.3d 43 (9th Cir. 1995) (waiver unavailable for assisting siblings or other family members (or those who later become family members))
    2. But IIRIRA § 351 overrode *Matter of Farias* by amending statute (and section 212(d)(11) of the Act) clarifying that familial relationship must have existed at the time of the unlawful entry in order for waiver to apply to section 241(a)(13) ground. *See Matter of Farias*, 21 I&N Dec. 269, 281-82 (BIA 1996, 1997; A.G. 1997); *See* Pub. L. No. 104-208, 110 Stat. 3009 (enacted Sept. 30, 1996).

VIII. When does the special rule/exception to inadmissibility or deportability apply?

A. Inadmissibility: Ground of inadmissibility does not apply to applicant seeking permanent residency as an IR or under second preference family-based visa category, who qualified for family unity under IMMACT90 § 301(b)(1), who was physically present in U.S. on May 5, 1988, and who assisted her spouse, parent, son or daughter

(and no other individual) to enter the U.S. in violation of law. Section 212(a)(6)(E)(ii) of the Act.

B. Deportability: Ground of deportability shall not apply to an alien who is an "eligible immigrant" (as defined in section 301(b)(1) of IMMACT90), who was physically present in U.S. on May 5, 1988, and who is seeking admission as an immediate relative or a spouse of unmarried son or daughter of LPR, if the alien assisted or abetted only their spouse, parent, or child in entering the US unlawfully and this occurred prior to May 5, 1988. Section § 237(a)(1)(E)(ii) of the Act.

IX. History of the Statutory Provisions

A. Alien smuggling has long been a ground of exclusion or deportability. Prior versions of the statutes are substantially similar to the current versions, except that the smuggling had to be "for gain." *See Matter of R-D-*, 2 I&N Dec. 758 (A.G. 1947); *see also* former section 212(a)(31) of the Act, 8 U.S.C. § 1182(a)(31) & former section 241(a)(13) of the Act, 8 U.S.C. § 1251(a)(13).

B. "For gain" requirement
   1. Excludable and deportable aliens: "Any alien who at any time shall have, knowingly *and for gain*, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law" (emphasis added). *See Matter of Compean*, 21 I&N Dec. at 52 n. 1 (BIA 1995); *Matter of Vargas-Banuelos*, 13 I&N Dec. at 812 (noting DHS had to establish element of gain by clear, convincing, and unequivocal evidence).
   2. "Actual receipt of money [was] not necessary," but an "agreement to pay later constitutes gain, or anticipated gain," and brought alien within the ambit of section 241(a)(13) of the Act. *Sanchez-Marquez v. INS*, 725 F.3d at 63 (citing *Matter of P.G.*, 7 I&N Dec. 514, 516 (1957))
   3. "For gain" requirement removed with enactment of IMMACT90. Pub. L. No. 101-649, 104 Stat. 4978, 5073-74, 5078 (Nov. 29, 1990). *See Altamirano v. Gonzales*, 427 F.3d at 592 n.5. However, other elements of the statutes remained the same. In addition, section 601 of IMMACT90 added a special waiver under section 212(d)(11), 8 U.S.C. § 1182(d)(11).
   4. Congress revised smuggling provision in 1990 because the previous section's requirement that the assistance be "for gain" had "created difficult proof problems" in certain situations, such as where payment had not yet been tendered. *See Tapucu v. Gonzales*, 399 F.3d at 740. This change in smuggling provision led

courts to address for the first time when someone has knowingly "assisted" an entry.

C. Section 307(d) of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991
   1. Amended section 212(d)(11). *See Matter of Compean*, 21 I&N Dec. at 53.
   2. Added the "family-unity waiver" under section 237(a)(1)(E)(ii).

D. Executive Order 13767: Border Security and Immigration Enforcement Improvements (Jan. 25, 2017)
   1. Puts into place accountability measures to protect alien children and prevent exploitation against smuggling
   2. Secretary Kelly DHS Memo: Implementing the President's Border Security and Immigration Enforcement Improvements Policies (Feb. 20, 2017)
      a) ICE and CBP are to ensure the proper enforcement of U.S. immigration laws against any individual who – directly or indirectly – facilitates the illegal smuggling or trafficking of an alien child into the United States.
      b) To counter threat by criminal organizations, government task forces are directed to plan and implement counter-network ops directed at disrupting transnational criminal organizations, focused on those involved in human smuggling.
      c) Results of EO: Secretary Kelly released a statement on May 8, 2017, that there has been an "increase in the fees charged by human smugglers along U.S. southwest border" and attributes the increase to changes in U.S. policy.

[1] Although the plain language of the statute (and *Dimova v. Holder*, 783 F.3d 30, 36 (1st Cir. 2015)) lays out the elements as described in Section C of this outline in such an order, for purposes of convenience, this outline will first discuss "entry" or attempted entry.

[2] In *Dimova v. Holder*, *supra*, at 38-40, the First Circuit determined that the facts did not show that the alien family had not completed its "entry" when the respondent picked them up in a remote wooded area in the United States within a matter of hours after their physical crossing from Canada).

[3] "Congress intended the civil alien smuggling statute to apply to a broad range of conduct." *Urzua Covarrubias v. Gonzales*, 487 F.3d 742, 748 (9th Cir. 2007) (citing *Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674 (9th Cir 2005)).

[4] Sarah Cade, *Removability for Smuggling Under Sections 212(a)(6)(E) and 237(a)(1)(E) of the Immigration and Nationality Act*, 4 (No. 3) IMM. L. ADVISOR (March 2010), at 2-3, 13.

[5] *See, e.g., id.* at 13.

[6] *See id.* at 13-14.

[7] *Id.* at 14.

[8] *Id.*